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**IN THE  
COURT OF APPEALS OF INDIANA**

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|----------------------|---|-----------------------|
| REGINAL SISTRUNK,    | ) |                       |
|                      | ) |                       |
| Appellant-Defendant, | ) |                       |
|                      | ) |                       |
| vs.                  | ) | No. 18A02-0702-CR-139 |
|                      | ) |                       |
| STATE OF INDIANA,    | ) |                       |
|                      | ) |                       |
| Appellee-Plaintiff.  | ) |                       |

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APPEAL FROM THE DELAWARE CIRCUIT COURT  
The Honorable Marianne L. Vorhees, Judge  
Cause No. 18C01-0605-FB-8

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**October 18, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**KIRSCH, Judge**

Reginal Sistrunk was convicted after a jury trial of robbery resulting in bodily injury,<sup>1</sup> a Class B felony. He appeals raising one issue, which we restate as whether the trial court abused its discretion when it allowed a stained and torn shirt into evidence when defense counsel was notified of the evidence only days before the trial began.

We affirm.

### **FACTS AND PROCEDURAL HISTORY**

On the evening of May 6, 2006, sales manager, Jerald Barth, and loss prevention officer, Eric Greenburg, both employees of J.C. Penney in the Muncie Mall, observed Sistrunk in the young men's department "acting a little peculiar." *Tr.* at 24. Sistrunk was "fiddling around with the merchandise but not really actually looking at the merchandise, just scanning looking for employees." *Id.* at 114. Sistrunk approached a cashier and placed a note on the counter, which stated, "this is a stick-up, I have a gun, give me money." *Id.* at 61. He had his hand in his pocket like he had a gun and told the cashier, "hurry up, give me money" or he would shoot. *Id.* at 61, 83. The cashier then gave Sistrunk money from the cash register, and Sistrunk exited the store.

Barth and Greenburg followed Sistrunk out of the store, across the street, and to the back of a car dealership. Sistrunk lost his shoes during the pursuit, and after jumping over a retaining wall, he tripped and fell. Greenburg tackled Sistrunk, and Barth helped subdue him. The men wrestled with Sistrunk for a few minutes, and during this struggle, Sistrunk grabbed Barth's tie and pulled it enough to choke Barth, causing him to have difficulty breathing. After a short period of time, Barth was able to stop the choking by ripping his tie

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<sup>1</sup> See IC 35-42-5-1.

and shirt collar. Due to Sistrunk's actions, Barth suffered neck pain and a headache, which lasted a day. The stolen money was recovered from the ground near Sistrunk.

The State charged Sistrunk with armed robbery, robbery resulting in bodily injury, battery, and with being an habitual offender. Before the trial, the State dismissed the battery charge. A jury trial was held on January 22, 2007, and at the beginning of the trial, Sistrunk made a motion to exclude Barth's shirt that he had worn during the struggle with Sistrunk, which was torn and had blood spots on it, from being admitted into evidence. Barth had provided the shirt to the State three days prior to trial, and the State had provided the shirt to the defense on the same day. The trial court denied Sistrunk's motion, finding the shirt admissible as long as the State did not argue that the blood belonged to anyone else other than Sistrunk. *Id.* at 21. The shirt was admitted into evidence at the trial, and Barth testified that Sistrunk was bleeding during the struggle and the blood on the shirt belonged to Sistrunk. *Id.* at 38. The jury found Sistrunk guilty of robbery resulting in bodily injury. The trial court sentenced him to sixteen years in the Department of Correction. Sistrunk now appeals.

### **DISCUSSION AND DECISION**

"The trial court has broad discretion in dealing with discovery violations and may be reversed only for an abuse of discretion that involves clear error and resulting prejudice." *Berry v. State*, 715 N.E.2d 864, 866 (Ind. 1999). A continuance is the usual remedy for a discovery violation, and "[e]xclusion of the evidence is an extreme remedy and is to be used only if the State's actions were deliberate and the conduct prevented a fair trial." *Id.* Failure to request a continuance constitutes a waiver of any alleged discovery violation. *Fleming v.*

*State*, 833 N.E.2d 84, 91 (Ind. Ct. App. 2005).

Sistrunk argues that the trial court abused its discretion when it allowed Barth's torn and bloody shirt to be admitted into evidence. He contends this is because the shirt was only provided to him three days before the trial began, and there was no prior notice given as to the existence of the shirt. Because of the late production of the shirt, Sistrunk claims that he was not able to have any testing done on the shirt to determine if the substance on the shirt was blood, and if so, whose blood it was.

Here, the evidence in question, Barth's shirt, was not provided to the State until three days before the trial was to begin. The State then made the shirt available to Sistrunk on that same day. Therefore, the State's action in not providing the shirt to Sistrunk any earlier was not deliberate as it did not even have possession of said shirt until the day it was given to Sistrunk. We also conclude that the State's conduct did not prevent Sistrunk from receiving a fair trial. At trial, Sistrunk did not dispute his involvement in the robbery or the scuffle; instead, he challenged whether the robbery resulted in bodily injury to Barth. Specifically, he argued that no witness observed him pull on Barth's tie, Barth did not complain of any injury at the scene, and no medical help was requested. The shirt, which had blood on it, did not aid the State in proving the requisite injury to Barth because Barth testified that he believed that the blood on the shirt belonged to Sistrunk. To prove robbery resulting in bodily injury as a Class B felony the State was required to show that the crime resulted in "bodily injury to *any other person* than a defendant." IC 35-42-5-1 (emphasis added). Evidence of Sistrunk's blood was not relevant to proving bodily injury to Barth, which was the injury alleged in the charge.

Further, additional time to perform testing on the shirt may have actually hurt the defense. In the trial testimony, Barth stated that he believed that the blood belonged to Sistrunk. *Tr.* at 38. If testing would have established that the blood belonged to someone other than Sistrunk, this would have strengthened the evidence that bodily injury occurred to another person. Because the delay in producing the evidence was not deliberate and because it did not prevent Sistrunk from receiving a fair trial, exclusion of the evidence was not the proper remedy. To the extent Sistrunk was entitled to any remedy, a continuance would have been proper. *See Berry*, 715 N.E.2d at 866. However, Sistrunk did not request a continuance. Therefore, we conclude that the admission of the shirt was not an abuse of discretion.

Additionally, Sistrunk contends that the admission of Barth's testimony that the substance on the shirt was blood and that it belonged to Sistrunk was an abuse of discretion. He claims that the admission of the testimony violated Indiana Evidence Rules 701 and 702. Evidence Rule 702 is not implicated by Barth's testimony because Barth did not provide expert testimony based on "scientific, technical, or other specialized knowledge." Ind. Evidence Rule 702(a). Barth's testimony was based on his opinion of the blood's origin based on his own perception; he testified that he believed that the substance on the shirt was Sistrunk's blood because he observed Sistrunk bleeding after the confrontation. *Tr.* at 38. Although Sistrunk seems to argue that this testimony violated Evidence Rule 701, such testimony is explicitly permitted under that rule:

If the witness is not testifying as an expert, the witness's *testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear*

understanding of the witness's testimony or the determination of a fact in issue.

Evid. R. 701 (emphasis added). We therefore conclude that the trial court did not abuse its discretion in allowing Barth's testimony regarding his opinion that the substance on his shirt was blood and that it belonged to Sistrunk.

Affirmed.

ROBB, J., and BARNES, J., concur.